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C O N F I D E N T I A L SECTION 01 OF 03 MADRID 001269

SIPDIS

PASS TO ELIZABETH FARR OF NSC, MARC NORMAN OF S/CT AND
ELAINE SAMSON AND STACIE ZERDECKI OF EUR/WE, AND JANICE
BELL OF INR

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SUBJECT: FURTHER THOUGHTS ON SPAIN'S COUNTER-TERRORISM
APPROACH

REF: MADRID 1214

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Classified By: DCM Arnold A. Chacon for reasons 1.4 (b) and (d)

1. (C) SUMMARY. This cable continues the discussion from REFTEL, which examined recent Supreme Court acquittals of lower court convictions of radical Islamic jihadists. Most recently, the Supreme Court on October 7 overturned 14 of 20 convictions for a 2004 case known as Operation Nova; on November 7 the Court issued its majority opinion which justified the decision. Since coming to power in April 2004 in the aftermath of the Madrid train bombings, the Zapatero government's security forces have carried out at least 28 operations against radical Islamists in Spain. They have arrested 361 radical Islamists for a range of crimes; however, only 23, or a little more than five percent, are currently in prison. POLOFF held a range of further discussions on the topic with judicial authorities, journalists, GOS officials, CT experts, and academics whose views span the political spectrum and whose analysis of the current judicial and legal framework for Spanish counter-terrorism (CT) and on the need for CT reform to adapt to the concept of "preventative justice" varies dramatically. Those in favor of the current Spanish CT legislative and judicial framework at most concede that the system is flawed, but they are adamant that the system works, that it enjoys public support, and offer as proof the absence of additional deaths in Spain at the hands of jihadists since the Madrid train bombings. Critics allege that the system offers false confidence. They argue in favor of seeking longer sentences for those convicted and fewer acquittals on the part of the Supreme Court. The GOS's recently announced CT reforms appear to be a humble, if well meaning, step in the right direction. END SUMMARY.

2. (C) On November 21, POLOFF discussed the Supreme Court's November 7 majority opinion with Vicente Gonzalez Mota, the prosecutor for the upcoming case against the cell detained in January 2008 (as Operation Cantata) that allegedly sought to attack the Barcelona subway system. Like a mantra, Gonzalez Mota repeatedly asserted that the most important thing is that, domestically, Spain has suffered no further deaths at the hands of radical Islamic terrorists since the Madrid train bombings. He argued that the system works, that it is necessary to win the battle against terrorists "within the law," and that the Spanish public supports the GOS approach

to CT. Asked if the Supreme Court ruling on the Operation Nova case would make his prosecution of the Barcelona case more difficult, Gonzalez Mota -- who was quoted in a March 2008 New York Times article as saying the evidence in the case is weak -- diplomatically replied that abiding by a Supreme Court ruling never makes his job more difficult. Although he stated his unequivocal belief that those arrested in Operation Cantata are guilty, Gonzalez Mota predicted that they will go to trial in 2009, will have an appellate hearing in 2010, and some may be released in 2011, which he argued "is not bad" because it will have served to keep those radicals off the Spanish streets for three years or more.

13. (C) Not everyone agrees with Gonzalez Mota's views. Jesus Maria Zuloaga, a well-connected journalist who covers CT issues as the Deputy Director of conservative-leaning, La Razon newspaper, is a fierce critic of the current Spanish CT approach. In a November 21 conversation with POLOFF and Embassy Madrid's press attache, Zuloaga condemned the Supreme Court's October 7 ruling as "an absolute disaster" and "a big step backwards" that undermines public confidence in the appropriateness of arrests by the Spanish security services. He argued that the November 7 majority opinion requires "a God-like prescience" on the part of the security forces to know exactly when is the right time to act against radical Islamists who cross the line between holding extremists beliefs and acting on them. Zuloaga insisted that security services cannot wait until jihadists put on a suicide vest before they can be detained. Asked if the October 7 ruling by the Supreme Court and its November 7 interpretation of the law made the security forces' CT work more difficult, Zuloaga replied, "Absolutely," and suggested that Spanish security services are extremely worried about it. He suggested that the November 7 majority opinion was sending mixed signals by

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telling the security forces that they did the right thing by arresting these suspects when they did, but then in the same document the Supreme Court outlines the reasons why its decision to overturn their convictions is correct. Zuloaga said the Supreme Court needs to better support the security services.

14. (C) POLOFF discussed the issue on November 24 with Javier Jordan, a political science professor at the University of Granada and the director of Athena Intelligence, a foundation devoted to CT research. Jordan is known to Embassy Madrid as a CT expert who is not alarmist in his analysis. His comments to POLOFF show that, in this debate, he more readily sides with Zuloaga's criticism than with Gonzalez Mota's defense of the current CT framework. Jordan pointed out that since coming to power in April 2004 in the aftermath of the Madrid train bombings, the Zapatero government's security forces have carried out at least 28 operations against radical Islamists in Spain. Security forces have arrested 361 radical Islamists for a range of crimes; however, only 23, or a little more than five percent, are currently in prison. Like Zuloaga, Jordan suggested that the overturning of lower-court convictions is negatively affecting the morale and image of the Spanish security forces.

15. (SBU) The GOS has made some effort to reform its CT legislation in recent weeks. The Council of Ministers on November 14 approved a reform to the 1995 Penal Code that offers tougher penalties for a range of offenses. On CT, the reforms would make financing of terrorist activities punishable by 5-10 years in jail and would authorize the monitoring of terrorists convicted of murder or grievous bodily injury for up to 20 years after they are released from prison. (COMMENT: The CT component of these reforms was largely influenced by the public uproar over the August 2008 release of Jose Ignacio Juana de Chaos, an unrepentant, high-profile ETA member who was released from jail after serving 21 years of a 3,000 year sentence for his part in separate attacks in the 1980s that killed 25 people -- including American citizen Eugene Kent Brown, a bystander who

was an unintended victim of a 1985 carbomb. END COMMENT).

¶6. (C) But some say the reforms are insufficient. Zuloaga acknowledged that the proposed CT reforms -- which still need approval in the Spanish parliament to take effect -- would apply to both domestic terrorists from the Basque Fatherland and Liberty (ETA) terrorist group as well as to radical Islamic terrorists, however he argued that the proposed reform is flawed. For example, he highlighted to POLOFF that it would not apply to Imad Eddin Barakat Yarkas, aka Abu Dahdah, the leader of the Al Qaeda cell in Spain who was detained in November 2001 in the aftermath of 9/11, because Yarkas did not personally kill or injure anyone. Zuloaga further noted that, with the Supreme Court's acquittal in 2006 of Yarkas's 15-year sentence for involvement in helping to plan 9/11, he is currently scheduled to be released in 2013, when he completes his 12-year sentence for belonging to a terrorist organization.

¶7. (C) Jordan and his colleague, Pilar Pozo, a fellow member of Athena Intelligence and a professor of international public law at the University of Valencia, described to POLOFF different proposals for further CT reforms that would create a new type of prosecutable offense. One would involve tweaking the "universal jurisdiction" basis for "Crimes Against Humanity" which the GOS has used for more than a decade in cases where the accused, such as former Chilean dictator Gen. Augusto Pinochet or the generals and security forces of Argentina's military dictatorship, committed crimes outside Spain. Pozo argued that the legal basis is there, but it would need to be reinterpreted to enable the GOS to go after terrorists who commit "war crimes" abroad. In theory, this new law would enable the GOS to prosecute terrorists who fought or undertook jihadist training in Iraq, Afghanistan, or elsewhere. However, Pozo and Jordan admitted that this proposal is really just an idea at this point and would need someone to champion it; they suggested someone as high-profile and as respected on CT issues as investigating judge Baltasar Garzon, who made his name in part by going after Pinochet and the others for "Crimes Against Humanity."

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Pozo acknowledged that this proposal would be very sensitive because it involved making a political judgment about the nature of the conflict involving radical jihadists. She suggested that the proposal might have a chance at becoming law, if the public opinion supported it, but correctly recognized that this would imply a "considerable change" in the mentality of the Spanish public.

¶8. (C) At present the prospects for the proposal described by Jordan and Pozo appear slim, judging from prepared remarks by Antonio Camacho, the Secretary of State for Security (the number-two official in the Ministry of Interior), on November 19 as part of a CT conference in Madrid co-sponsored by the US Embassy, among others. Camacho publicly asserted that it is counterproductive and sensationalist to suggest that there is a War Against Terrorism, which would preempt the idea of considering "war crimes" as a way to go after terrorists. He made the case that the West is in a fight -- not a war -- against delinquents, who nevertheless enjoy a panoply of rights. Camacho said we have to "advance beyond" the idea that we are at war and suggested that Europe ought to have an influential voice in the debate on the nature of the jihadist threat. He argued that the debate between using hard or soft power is the wrong conceptual approach and asserted that the best way to respond to the threat was with an integrated solution of police, judicial, socio-economic, cultural and international cooperation.

¶9. (C) COMMENT: Those in favor of the current Spanish CT legislative and judicial framework at most concede that the system is not perfect, but they are adamant that it works and that it enjoys public support. They offer as proof the absence of additional deaths in Spain at the hands of jihadists since the Madrid train bombings. However, as

Spanish CT expert Fernando Reinares told POLOFF in October, how would Spanish public opinion have responded if the Barcelona cell in Operation Cantata had been successful in its alleged plot? Critics allege that the system offers false comfort. They argue in favor of seeking longer sentences for those convicted and fewer acquittals on the part of the Supreme Court. The GOS's recently announced CT reforms appear to be a humble, if well meaning, step in the right direction. END COMMENT.
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